IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEXINGTON INSURANCE COMPANY, Plaintiff,	: :	CIVIL ACTION
v.	:	NO. 01-5196
CALECO, INC., and PECO, INC., Defendants.	: :	

MEMORANDUM AND ORDER

LEGROME D. DAVIS, J. JANUARY 25, 2003

I. Background and Procedural History

On June 16, 2001, severe storms and flooding caused water to enter into and gather in the basement laundry room area of Building A of the Village Green Apartments, a residential apartment complex in Hatboro, Pennsylvania. The water caused a clothes dryer in the laundry room area to become dislodged. According to the allegations in the Complaint filed in this matter, this resulted in a break in the steel gas line connected to the dryer, which, in turn, caused gas to accumulate within Building A, ultimately resulting in an explosion and a fire which destroyed Building A and killed six individuals.

The Scully Company ("Scully") is the property management company that managed the Village Green Apartments. Scully was insured by Plaintiff Lexington Insurance Company ("Plaintiff"), an insurance company based in Massachusetts and licensed to do business in Pennsylvania. Following the explosion and fire, Scully filed a claim with Plaintiff seeking to recover the costs of the resulting damages. Plaintiff paid approximately four million dollars to

Scully pursuant to Scully's insurance claim. Plaintiff then filed the instant subrogation suit on October 12, 2001, against Defendants Caleco, Inc. ("Caleco") and PECO, Inc. ("PECO"). Caleco, a Pennsylvania corporation, owned, installed, operated, and maintained the dryers in the Village Green Apartment laundry room. PECO, also a Pennsylvania corporation, supplied gas to the Village Green Apartments. In this suit, Plaintiff states claims for negligence and breach of implied warranties against both Defendants. Plaintiff also states a strict liability claim against PECO, and a breach of contract claim against Caleco.

In addition to this federal action, there are apparently three actions related to this incident currently pending in state court. One lawsuit, Manlove v. Philadelphia Electric Co. et al., Phila. C.C.P., Sept. Term 2001, No. 3022, was instituted by the executors of the Estate of John N. Manlove (the "Manlove Action"). A second suit, Williams et al. v. Scully Company et al., Phila. C.C.P., March Term 2002, No. 547, was instituted by the fiduciaries of the estates of Louisa Mae Williams, Roger Allen Williams, Rudolph J. Malizia, and Angelina Malizia, and by Nicholas Baldini, Michelle Seeger, Thomas Mulvihill, John Denny, Godron Weir, and Anne Weir (the "Williams Action"). A third action, Whitaker v. Scully Company et al., Phila. C.C.P., April Term 2002, No. 2239, was instituted by the executor of the Estate of Ruth Ann Widmer (the "Whitaker Action"). See Motion to Intervene and for a Stay of All Proceedings, at 2 & n.1; Reply Memorandum in Support of Motion to Intervene and for a Stay of All Proceedings, at 1 n.1.

Presently before the Court are the following motions: (1) a Motion to Dismiss Counts V and VI of Plaintiff's Amended Complaint for Failure to State a Claim for Either Strict Liability or Breach of Warranty, filed by PECO on December 21, 2001; (2) a Motion to Dismiss, or in the

Alternative, to Stay this Action Pending Resolution of State Court Action, filed by PECO on January 7, 2002; (3) a Motion for Stay filed by Caleco on January 15, 2002; (4) a Motion to Intervene and for a Stay of All Proceedings filed on March 27, 2002 by the fiduciaries of the estates of Louisa Mae Williams, Roger Allen Williams, Rudolph J. Malizia, and Angelina Malizia, and by Nicholas Baldini, Michelle Seeger, Thomas Mulvihill, John Denny, Godron Weir, and Anne Weir; and (5) a Motion to Intervene and for a Stay of All Proceedings filed by Donald N. Manlove and Diane Simmons on April 3, 2002. For the reasons set forth below, this Court will: (1) deny PECO's Motion to Dismiss Counts V and VI of Plaintiff's Amended Complaint; (2) deny PECO's Motion to Dismiss, or, in the Alternative, to Stay this Action Pending Resolution of State Court Action; (3) deny Caleco's Motion for Stay; and (4) deny the two Motions to Intervene and for a Stay of All Proceedings.

II. PECO's Motion to Dismiss Counts V and VI of Plaintiff's Amended Complaint

PECO has filed a motion to dismiss Count V (a strict liability claim against PECO) and Count VI (a breach of implied warranties claim against PECO) of Plaintiff's Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Rule 12(b)(6) provides for dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In considering a Rule 12(b)(6) motion to dismiss, "[w]e must accept as true all of the factual allegations in the complaint as well as the reasonable inferences that can be drawn from them," Doe v. Delie, 257 F.3d 309, 313 (3d Cir. 2001), and we must view the allegations "in the light most favorable to plaintiff," In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir. 1997). "We may dismiss the complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Doe, 257

F.3d at 313. "A motion to dismiss pursuant to Rule 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." In re Burlington Coat Factory, 114 F.3d at 1420. "'The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" Id. (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

In its 12(b)(6) Motion to Dismiss, PECO argues that Plaintiff's strict liability and breach of implied warranties claims are both subject to dismissal because, even taking the allegations in Plaintiff's Amended Complaint as true, Plaintiff has not alleged the elements required to impose strict liability or to find a breach of an implied warranty in this context. The Court concludes that the strict liability and breach of implied warranties claims in Plaintiff's Amended Complaint are sufficient to withstand the Motion to Dismiss.

Under Pennsylvania law, in order to prevail on either a strict liability claim, or a claim for breach of an implied warranty,[1] a plaintiff must show, in addition to various other elements, that there was a sale of a product or good, and that such product or good was defective. See Dougherty v. Hooker Chemical Corp., 540 F.2d 174, 177 (3d Cir. 1976) (pursuant to § 402A of the Restatement (Second) of Torts, which has been adopted by Pennsylvania courts, "strict liability arises from the sale of any product in a defective condition unreasonably dangerous to the user or consumer"); Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102, 1105 (3d

[1] A breach of implied warranty claim may involve a claim for breach of the implied warranty of fitness for a particular purpose, see 13 Pa. Cons. Stat. Ann. § 2315 (2003), or the implied warranty of merchantability, see 13 Pa. Cons. Stat. Ann. § 2314 (2003).

Cir.1992) ("Both the implied warranty of merchantability and the warranty of fitness for a particular purpose arise by operation of law and serve to protect buyers from loss where the goods purchased are below commercial standards or are unfit for the buyer's purpose."). PECO argues that Plaintiff's strict liability and breach of warranties claims are premised upon the contention that PECO supplied allegedly defective regulating equipment, and that both claims must fail because the allegedly defective regulating equipment was never sold by PECO.

Initially, Plaintiff's Amended Complaint does not clearly identify whether the particular defective product or good in question is alleged to be the *gas* supplied by PECO, or the *regulating equipment* supplied by PECO, or both. The strict liability claim against PECO in the Amended Complaint expressly provides that "the natural gas" supplied by PECO "was defective and unreasonably dangerous," as well as "unregulated and unsafe for its intended use." See Plaintiff's Amended Complaint ("Pl.'s Amended Complaint") at 9, ¶ 37, 38. Similarly, the breach of implied warranties claim expressly provides that the gas supplied by PECO was not merchantable or suitable for its intended use because it was "unregulated, unsafe for use and not in conformity with the gas supply plaintiff's insured bargained for with PECO." See Pl.'s Amended Complaint at 9, ¶ 41, 42. However, Plaintiff contends elsewhere in the Amended Complaint that it was "the gas distribution, metering and regulating equipment," supplied by PECO and located in the basement of Building C of the Village Green Apartments, which was defective, rather than the gas. See Pl.'s Amended Complaint at 3, ¶ 11, 12, 14, 16 (alleging that the distribution, metering and regulating equipment was submerged in, and infiltrated by, water as a result of the severe storms, which caused an increase in the *rate* at which the gas flowed into the laundry area in Building A, which in turn contributed to the cause of the explosion).

To the extent that the strict liability and breach of warranties claims are premised upon the allegation that the *regulating equipment* in the basement of Building C constitutes the defective good or product in question, PECO is correct that these claims are deficient as a matter of law. This is because the Amended Complaint expressly acknowledges that the regulating equipment was owned by PECO,[2] and was never sold by PECO, as is required for strict liability and breach of implied warranty claims. See, e.g., Rush v. UGI Corp., 12 Pa. D. & C. 3d 302 (1979) (holding that the defendant's allegedly defective gas main could not trigger strict liability under § 402A because it was not sold or delivered to gas customers).

However, to the extent that the strict liability and breach of implied warranties claims are premised upon the allegation that the *gas* supplied by PECO constitutes the defective product or good in question, the allegations in Plaintiff's Amended Complaint are sufficient to withstand the Motion to Dismiss. Consumable goods, such as gas and electricity, may be considered distinct, tangible, movable products once they pass through the customer's meter. See Schriner v. Pennsylvania Power & Light Co., 501 A.2d 1128, 1133 (Pa. Super. 1985). Moreover, although Plaintiff has not specified in the Amended Complaint how the gas was allegedly defective, Plaintiff's allegation that the gas was defective is sufficient to withstand the Motion to Dismiss, and Plaintiff should be permitted an opportunity to discover and offer evidence to support this allegation. See Maio, 221 F.3d at 482. For these reasons, PECO's Motion to Dismiss Counts V and VI of Plaintiff's Amended Complaint must be denied.

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[2] "The gas distribution equipment within Building C and the related piping and devices, were owned, maintained, installed, fabricated and designed by defendant PECO." Pl.'s Amended Complaint at 3, ¶ 12.

III. PECO's Motion to Dismiss or Stay and Caleco's Motion for Stay

PECO filed a motion on January 7, 2002 (referred to herein as PECO's Motion to Dismiss or Stay) requesting that this action be dismissed without prejudice, or, in the alternative, that this action be stayed. Caleco filed a motion on January 15, 2002 (referred to herein as Caleco's Motion for Stay), similarly requesting that this action be stayed. PECO's and Caleco's arguments are based upon the abstention doctrine set forth in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). We therefore begin with a brief review of the Colorado River doctrine, which sets forth a narrow exception to federal jurisdiction.

Generally, "'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" Colorado River, 424 U.S. at 817 (citation omitted). "The general rule regarding simultaneous litigation of similar issues in both state and federal courts is that both actions may proceed until one has come to judgment, at which point that judgment may create a res judicata or collateral estoppel effect on the other action." University of Maryland v. Peat Marwick Main & Co., 923 F.2d 265, 275-76 (3d Cir. 1991). "Nevertheless, in Colorado River, the Supreme Court recognized that there are certain extremely limited circumstances in which a federal court may defer to pending state court proceedings based on considerations of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" Ryan v. Johnson, 115 F.3d 193, 195-96 (3d Cir. 1997) (quoting Colorado River, 424 U.S. at 817).

"A threshold issue that must be decided in any Colorado River abstention case is whether the two actions are 'parallel.' If they are not, then the district court lacks the power to abstain. . . .

Generally, cases are parallel when they involve the same parties and claims." Ryan, 115 F.3d at 196. "[W]hen a federal court case involves claims that are distinct from those at issue in a state court case, the cases are not parallel and do not justify Colorado River abstention." Trent v. Dial Medical of Florida, Inc., 33 F.3d 217, 224 (3d Cir. 1994). "It is important . . . that only truly duplicative proceedings be avoided. When the claims, parties, or requested relief differ, deference may not be appropriate." Complaint of Bankers Trust Co. v. Chatterjee, 636 F.2d 37, 40 (3d Cir. 1980).

Only if the two actions are found to be parallel, the court must then consider a number of factors to determine whether it should abstain: (1) whether the state court assumed in rem jurisdiction over property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained by the concurrent forums; (5) whether state or federal law provides the rule of decision; and (6) whether the state court would adequately protect the rights at issue. Id. at 196, 197 & n.3 (citing Colorado River, 424 U.S. at 818, and Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25-27 (1983)). Furthermore, "Colorado River abstention applies only in clear and exceptional cases, 'with the balance heavily weighted in favor of the exercise of jurisdiction.'" University of Maryland, 923 F.2d at 276 (quoting Colorado River, 460 U.S. at 16).

The sole pending state court action at the time of the filing of PECO's Motion to Dismiss or Stay and Caleco's Motion for Stay was the Manlove Action. It is patently clear that the Manlove Action and the present federal court action are not "parallel."[3] While the facts giving

[3] In their briefs, PECO and Caleco also argue that the present federal court action should be dismissed or stayed based upon the other state court suits which, at the time of PECO's and

rise to the present action and the Manlove Action may well be the same, and although some of the issues may overlap, neither the parties nor the issues in the two actions are substantially identical.

The defendants in the Manlove Action include PECO, Caleco, Scully (the property management company for the Village Green Apartments), Village Green Apartments, Inc., and Village Green Associates, L.L.P. Thus, four of the parties in the Manlove Action are not parties in the present action (the estate of John N. Manlove, Scully, Village Green Apartments, Inc., and Village Green Associates, L.L.P.). Furthermore, Plaintiff in the present action, Lexington Insurance Company, is not a party in the Manlove Action. Therefore, the parties in the Manlove Action and the present federal action are not the same.[4]

More importantly, neither the issues nor the claims in the state and federal actions are the same. The present subrogation suit brought by Lexington against PECO and Caleco involves (1)

Caleco's Motions, had not yet been filed, but which, PECO and Caleco argue, would likely be filed in the future by the estates of the other five decedents. PECO and Caleco have not cited any authority for the proposition that a federal court should consider abstaining based upon speculative future state court actions. Nor have PECO or Caleco filed additional documents requesting the Court to consider the two state court actions that have, in fact, been filed since the filing of PECO's and Caleco's Motions (the Williams Action and the Whitaker Action). Even assuming *arguendo* that the Court, under these circumstances, should consider these two additional state court actions, it appears that each of the two additional state court actions essentially mirror the Manlove Action, and therefore an analysis of why the present federal action and the Manlove Action are not parallel applies equally to the additional state court actions brought by the estates of the other decedents.

[4] PECO and Caleco argue that Plaintiff Lexington and Scully are essentially the same party, since the present action is a subrogation suit in which Plaintiff seeks to assert its right to "stand in the shoes" of its insured, Scully. See, e.g., Brennan v. Independence Blue Cross, 949 F.Supp. 305, 306 (E.D. Pa. 1996). Even assuming *arguendo* the validity of PECO's argument, there would still be three parties in the Manlove Action who are not parties in the present action (the estate of John N. Manlove, Village Green Apartments, Inc., and Village Green Associates, L.L.P.).

negligence claims against both PECO and Caleco, (2) a breach of contract claim against Caleco, and (3) a breach of implied warranty claim against Caleco, (4) a strict liability claim against PECO, and (5) a breach of implied warranty claim against PECO. The Manlove Action, on the other hand, states claims for negligence, seeks to recover damages pursuant to the Pennsylvania Wrongful Death Act, 42 Pa. Cons. Stat. Ann. § 8301 (2003), and the Pennsylvania Survival Act, 42 Pa. Cons. Stat. Ann. § 8302 (2003), and states a claim for punitive damages. Therefore, while certain issues in the federal action may overlap with issues in the Manlove Action, "the lack of identity of all issues necessarily precludes Colorado River abstention." University of Maryland at Baltimore v. Peat Marwick Main & Co., 923 F.2d 265, 276 (3d Cir. 1991); see also Complaint of Bankers Trust Co., 636 F.2d at 37 (holding that abstention under Colorado River is inappropriate where the two proceedings are not "truly duplicative"). Because the actions are not parallel, abstention pursuant to the Colorado River doctrine is not appropriate here. For this reason PECO's Motion to Dismiss or Stay, and Caleco's Motion For Stay, will be denied.

IV. Motions to Intervene and for a Stay

On March 27, 2002, a "Motion to Intervene and for a Stay of All Proceedings" was filed by the fiduciaries of the estates of four individuals (Louisa Williams, Roger Williams, Rudolph Malizia, and Angelina Malizia) who died in the fire on June 16, 2001, and by six additional individuals (Nicholas Baldini, Michelle Seeger, Thomas Mulvihill, John Denny, Godron Weir, and Anne Weir) who were injured in the fire. An identical motion was filed on April 3, 2002 by the fiduciaries of the estate of John N. Manlove, who also died in the fire.[5] According to the

[5] These two motions shall be referred to herein as the Motions to Intervene and for a Stay, and the parties filing the Motions to Intervene and for a Stay shall be referred to as Proposed

Motions to Intervene and for a Stay, Proposed Intervenors seek to intervene for the limited purpose of moving to stay all proceedings. Proposed Intervenors seek a stay of all proceedings on the grounds that they have filed actions in state court (the Manlove Action and the Williams Action) against various parties, including PECO and Caleco, and that they wish to protect their interest in having funds available to satisfy potential judgments against PECO and Caleco in the state court actions. In other words, Proposed Intervenors are concerned that if this action proceeds to judgment and Plaintiff collects significant damages from PECO and Caleco, Proposed Intervenors' ability to collect upon possible future judgments against PECO and Caleco in the state court actions will be impeded. Thus, Proposed Intervenors seek a stay of this action until their claims against PECO and Caleco have been resolved in the state court actions.

The Motions to Intervene and for a Stay must be denied for a number of reasons. To begin with, intervention generally contemplates that the proposed intervenor will align itself either as a plaintiff or as a defendant. See, e.g., Hubner v. Schoonmaker, 1990 WL 149207, at 7 (E.D. Pa.); Kamerman v. Steinberg, 681 F.Supp. 206, 211 (S.D.N.Y. 1988). Accordingly, intervention requires that the intervenor present a "claim or defense," see Fed. R. Civ. P. 24(c), related to the existing litigation, which the intervenor wishes to assert as part of the existing litigation rather than in a separate action, see Washington Elec. Co-op., Inc. v. Massachusetts Mun. Wholesale Elec. Co., 922 F.2d 92, 97 (2d Cir. 1990) ("The purpose of the rule allowing intervention is to prevent a multiplicity of suits where common questions of law or fact are involved.") (citing Reich v. Webb, 336 F.2d 153, 160 (9th Cir.1964), cert. denied, 380 U.S. 915

Intervenors.

(1965)). Specifically, Rule 24(c) requires that all motions to intervene "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). Here, Proposed Intervenors have not attached a "pleading setting forth the claim or defense for which intervention is sought" as required by Rule 24(c). This technical failing alone would warrant denial of the motion. See, e.g., School Dist. of Philadelphia v. Pennsylvania Milk Mktg. Bd., 160 F.R.D. 66, 67 (E.D. Pa. 1995); Creative Dimensions in Management, Inc. v. Thomas Group, Inc., 1999 WL 163621, at 2 n.4 (E.D. Pa. 1999); see also Securities and Exchange Commission v. Investors Sec. Leasing Corp., 610 F.2d 175, 178 (3d Cir. 1979) (holding that parties must comply with requirements of Rule 24(c)).

Furthermore, Proposed Intervenors' failure to comply with the requirement that they file "a pleading setting forth the claim or defense for which intervention is sought" represents more than merely a technical violation of Rule 24(c). In fact, it does not appear that Proposed Intervenors have any claim or defense for which intervention is sought – at least, none has been asserted. Proposed Intervenors seek to intervene not to assert a claim or defense, but rather to delay this action until the related state court actions are resolved. See Motion to Intervene and for a Stay of All Proceedings, filed March 27, 2002 ("Motion to Intervene"), at 1-2. This is not an appropriate basis for a motion to intervene.

In Kamerman v. Steinberg, 681 F.Supp. 206, the District Court for the Southern District of New York addressed a similar situation and reached the same conclusion. In that case, the movants sought to intervene pursuant to Rule 24 "for the limited purpose of pressing the motion to stay." Id. at 210. The movants argued that the federal action should be stayed until final disposition of a related state court action because, according to the movants, a judgment in the

federal action could prejudice the claims in the state court action. Id. The Court determined that this was not an appropriate basis for a motion to intervene:

> The court notes at the outset the peculiar character of movants' application to intervene. Ordinarily, a person desiring to intervene seeks to join a pending action either as a plaintiff or as defendant. The federal rules therefore require that the applicant "set forth the claim or defense for which intervention is sought." If the application is granted, the intervenor is "treated as if he [or she] were an original party . . . ." The movants here, on the other hand, do not seek to join this action as either plaintiffs or as defendants. They have no claim to press against defendants; nor have they any defense to assert against plaintiffs. In fact, they have no intention whatsoever of litigating the causes of action asserted in the federal complaint. Their sole purpose in submitting their motion is to delay the prosecution of the federal action. With this goal in mind, they dress in the language of Rule 24 what is in reality an application for some special status permitting them to press their motion for a stay. For this reason alone, the court believes that the application to intervene should be denied.

Id. at 211 (citations omitted). For similar reasons, this Court concludes that Proposed Intervenors here have "dress[ed] in the language of Rule 24 what is in reality an application for some special status permitting them to press their motion for a stay." Id. Because Proposed Intervenors have failed to file a pleading as required by Rule 24(c), and because they, in fact, do not seek to join this action as either plaintiffs or as defendants, and have no "claim or defense for which intervention is sought," the Motions to Intervene and for a Stay must be denied.[6]

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[6] Proposed Intervenors cite two cases in support of the proposition that "it is a well-established procedure in this Circuit for a non-party to move to intervene in an action for the purpose of moving for a stay." Reply Memorandum in Support of Motion to Intervene and for a Stay of All Proceedings, at 2. However, these two cases are distinguishable from the instant case. The first case, Securities and Exchange Commission v. Mersky, 1994 WL 22305 (E.D. Pa. 1994) (allowing United States Attorney to intervene in pending civil action in federal court), supports only the narrow proposition that "a state is permitted to intervene in a federal civil action when there is a pending state criminal action involving common questions of law or fact." Anthony v. City of Philadelphia, 2001 WL 118964, at 1 (E.D. Pa. 2001). In the second case,

Even if this Court were to consider the substantive merits of the Motions to Intervene and for a Stay, the Court would nonetheless deny the Motions because Proposed Intervenors' arguments are flawed on numerous levels. Proposed Intervenors argue that they should be permitted to intervene pursuant to Federal Rule of Civil Procedure 24(a) ("Intervention of Right")[7] or, in the alternative, pursuant to Rule 24(b) ("Permissive Intervention"). "Under Rule 24(a)(2), a person is entitled to intervene if (1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation." Harris v. Pernsley, 820 F.2d 592, 596 (3d Cir. 1987).

As to the requirement that an intervenor demonstrate "an interest relating to the property or transaction which is the subject of the action," Fed. R. Civ. P. 24(a)(2), "the applicant must

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Riley v. Simmons, 839 F.Supp. 1113 (D.N.J. 1993), the Court permitted the New Jersey Commissioner of Insurance, who had been appointed as the Rehabilitator of an insolvent life insurance company, to intervene in a federal action filed by 200,000 annuitants of the life insurance company against the former directors of the life insurance company. The Rehabilitator was permitted to intervene for the purpose of moving to dismiss or stay the federal action primarily because a particular New Jersey statute granted the Rehabilitator the power to "'prosecute any action which may exist on behalf of creditors, members, policyholders or shareholders of the insurer against any director or officer of the insurer,'" id. at 1118 (citing N.J.S.A. 17B:32-50(a)(15)), and because the Rehabilitator was therefore found to have "a cognizable duty which would be compromised if the Rehabilitator were not allowed to intervene," id. at 1118.

[7] Rule 24(a) provides: "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

demonstrate that there is a tangible threat to a legally cognizable interest," Harris, 820 F.2d at 601. Proposed Intervenors allege that their interest here is in ensuring that there are sufficient funds available to satisfy *potential* judgments against PECO and Caleco in the related state court actions. Although the Third Circuit Court of Appeals has not directly addressed the issue, District Courts in Pennsylvania have consistently held that intervention pursuant to Rule 24(a)(2) is inappropriate where the proposed intervenor's interest is contingent upon prevailing on a tort claim in a separate action. See Continental Casualty Co. v. SSM Group, Inc., 1995 WL 422780, at 3 (E.D. Pa. 1995) ("The court finds that this contingency weighs heavily against the granting of intervention as of right."); Liberty Mut. Ins. Co. v. Pacific Indemnity Co., 76 F.R.D. 656 (W.D. Pa. 1977) ("Analysis of cases involving interests factually similar to [proposed intervenor's] reveals that an interest contingent upon a favorable result in an associated lawsuit is not an interest sufficient to require intervention under Rule 24(a)."); see also Mountain Top Condominium Ass'n v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 368 n.11 (3d Cir. 1995) (recognizing the existence of "decisions denying a third party's motion to intervene when the party's interest depended upon prevailing on a tort claim in a separate action," but not expressly adressing the issue because the facts in the case before the Court did not present such an issue). Here, any interest Proposed Intervenors might have in the present action is clearly contingent upon obtaining judgments against PECO and Caleco in the related state court actions, and therefore intervention is inappropriate pursuant to Rule 24(a)(2).

Under Rule 24(a)(2), Proposed Intervenors must also demonstrate that "the interest may be affected or impaired, as a practical matter by the disposition of the action." Harris, 820 F.2d at 596. Here, even assuming *arguendo* that the interest articulated by Proposed Intervenors is

sufficient for purposes of 24(a)(2), the Court is unable to perceive any legitimate threat to that interest. In the present action, Plaintiff seeks to recover approximately four million dollars from Defendants PECO and Caleco. Plaintiff contends, and Proposed Intervenors do not dispute, that as of September 30, 2001, PECO had total assets of $10.791 billion, and that Caleco has a two million dollar primary insurance policy as well as a nine million dollar excess insurance policy, in addition to its corporate assets. See Plaintiff's Memorandum of Law in Opposition to Motion to Intervene and for a Stay of All Proceedings, at 10-11. Thus, even were Plaintiff to successfully recover 4 million dollars from PECO and Caleco, there is no indication that the assets of either PECO or Caleco would be depleted, and, therefore, no reason to conclude that Proposed Intervenors' interest may be impaired by the disposition of this action. For these reasons, the requirements for Intervention of Right are not satisfied here.

As to Proposed Intervenors' alternative argument in support of intervention, Rule 24(b)(2) provides for Permissive Intervention "[u]pon timely application" where "an applicant's claim or defense and the main action have a question of law or fact in common," and further provides that "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b)(2). As noted above, Proposed Intervenors do not appear to have any claim or defense for which intervention is sought, making it impossible to analyze whether Permissive Intervention is appropriate under the express language of Rule 24(b)(2). Moreover, it is clear that permitting Proposed Intervenors to intervene here would "unduly delay or prejudice the adjudication of the rights of the original parties," as Proposed Intervenors' express objective is to stay the present action until the related state court actions are resolved. For these reasons, Permissive

Intervention is not appropriate.

Finally, Proposed Intervenors also argue that if they are allowed to intervene, the Court should then consider and grant their motion to stay the present action because, pursuant to the "superior equities doctrine," the interests of Proposed Intervenors in the assets of PECO and Caleco are "superior" to those of Plaintiff. See Motion to Intervene at 8-11. In fact, the superior equities doctrine, which has only been cited in a single Pennsylvania case, Mellon Bank, N.A. v. National Union Ins. Co. of Pittsburgh, PA, 768 A.2d 865, 872 (Pa. Super. 2001), has absolutely no application to the instant circumstances. The doctrine addresses the situation where an insurer-subrogee seeks to recover from a third party whose conduct allegedly contributed to or permitted the loss. See id. (citing Gregory R. Veal, Subrogation: The Duties and Obligations of the Insured and Rights of the Insurer Revisited, 28 Tort and Insurance Law Journal 69, 70-71 (1992) [hereinafter Veal]).[8] The doctrine has no relevance to the present question of whether injured parties suing an alleged tortfeasor with limited funds for injuries arising out of a particular incident have some sort of "superior" claim over an insurer-subrogee who, in a parallel action, has sued the same alleged tortfeasor for property damage suffered by its insured arising out of the same incident. Thus, even if Proposed Intervenors were permitted to intervene, it does not appear that they would be entitled to stay the present proceedings.

[8] For example, where a bank is insured by an insurer, and the bank suffers a loss as a result of an outsider who cashes forged checks with the bank, the insurer, after compensating the insured for the loss, may seek to recover from a director or officer of the bank who, the insurer alleges, bears some degree of responsibility for the circumstances surrounding the loss. See Veal at 78-79. According to the superior equities doctrine, a court in such circumstances should compare the relative positions of the insurer-subrogee and the subrogation defendant, and decide who ultimately should bear the loss. See id. at 70-71.

For the above-stated reasons, the Motions to Intervene and for a Stay will be denied.

V. Conclusion

In summary, PECO's Motion to Dismiss Counts V and VI of Plaintiff's Amended Complaint will be denied; PECO's Motion to Dismiss, or in the Alternative, to Stay this Action Pending Resolution of State Court Action will be denied; Caleco's Motion for Stay will be denied; and Proposed Intervenors' Motions to Intervene and for a Stay will be denied. An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEXINGTON INSURANCE COMPANY, Plaintiff,	: :	CIVIL ACTION
v.	:	NO. 01-5196
CALECO, INC. and PECO, INC., Defendants.	: :	

AMENDED ORDER

AND NOW, this day of January, 2003, it is hereby ORDERED as follows:

1. The Court's previous Order in this matter, dated and filed on January 27, 2003, is hereby RESCINDED and is superceded in full by this Order. The Memorandum previously filed accompanying the rescinded Order remains in effect.

2. The "Motion to Dismiss Counts V and VI of Plaintiff's Amended Complaint for Failure to State a Claim for Either Strict Liability or Breach of Warranty," filed by Defendant PECO, Inc. ("PECO") on December 21, 2001 (**Docket No. 8**), is DENIED.

3. The "Motion to Dismiss, or in the Alternative, to Stay this Action Pending Resolution of State Court Action," filed by PECO on January 7, 2002 (**Docket No. 11**), is DENIED.

4. The "Motion for Stay" filed by Defendant Caleco, Inc. on January 15, 2002 (**Docket No. 13)** is DENIED.

5. The "Motion to Intervene and for a Stay of All Proceedings" filed by the fiduciaries of the estates of Louisa Mae Williams, Roger Allen Williams, Rudolph J. Malizia, and Angelina

Malizia, and by Nicholas Baldini, Michelle Seeger, Thomas Mulvihill, John Denny, Godron Weir, and Anne Weir.on March 27, 2002 (**Docket No. 22**), and the "Motion to Intervene and for a Stay of All Proceedings" filed by Donald N. Manlove and Diane Simmons on April 3, 2002 (**Docket No. 23**), are DENIED.

BY THE COURT:

Legrome D. Davis